

Objection Date and Time: May 3, 2019 at 11:30 a.m. ET

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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

IN RE:

**SEARS HOLDINGS CORPORATION, *et al.*,

Debtors.**

CHAPTER 11

CASE NO. 18-23538-RDD

(Jointly Administered)

**RESERVATION OF RIGHTS OF WASHINGTON PRIME GROUP INC. TO THE
DEBTORS' NOTICE OF ASSUMPTION AND ASSIGNMENT OF ADDITIONAL
DESIGNATABLE LEASES (DOCKET NO. 3298)**

TO THE HONORABLE ROBERT D. DRAIN,
UNITED STATES BANKRUPTCY JUDGE:

Washington Prime Group Inc. ("WPG"), as managing agent for the owner of the properties identified herein, by its undersigned counsel, FROST BROWN TODD LLC, hereby submits this reservation of rights (this "Reservation of Rights") to the above-captioned debtors' (the "Debtors")

Notice of Assumption and Assignment of Additional Designatable Leases (Docket No. 3298) (the “Supplemental Notice of Assumption and Assignment”).¹ In support of this Reservation of Rights, WPG respectfully states:

BACKGROUND

1. On October 15, 2018 (the “Petition Date”), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Southern District of New York (this “Court”).

2. WPG is the owner of, or the managing agent for the owners of, certain real properties in which the Debtors lease retail space (the “WPG Leased Premises”) from WPG pursuant to those certain unexpired leases (collectively, the “WPG Leases” and each a “WPG Lease”).² Specifically, the Debtors are currently leasing retail space from WPG at the locations identified on **Exhibit A** attached hereto and incorporated herein (the “Leased Premises”).³

3. The Leased Premises are located in “shopping centers” as that term is used in section 365(b)(3) of the Bankruptcy Code. *See In re Joshua Slocum, Ltd.*, 922 F.2d 1081, 1086-87 (3d Cir. 1990).⁴

4. On November 1, 2018, the Debtors filed their *Motion for Approval of Global Bidding Procedures* (Docket No. 429) (the “Sale Motion”) seeking, among other things, approval of

¹ Capitalized but undefined terms used in this Supplement shall have the meanings ascribed to them in the Supplemental Notice of Assumption and Assignment or the Sale Motion, as defined in this Objection and as applicable.

² See Footnote 3.

³ The WPG Leases on Exhibit A include certain operating agreements and other agreements that WPG has entered into with non-debtor party Seritage SRC Finance LLC, identified as “Seritage SRC Finance LLC-Associated Leases” on Exhibit A, as well as certain operating agreements and other agreements that WPG has entered into with Debtors.

⁴ See, e.g., Washington Prime Group Inc. 2018 Form 10-K, pg. 4 (“Our primary business is the ownership, development and management of retail real estate within the United States.”). A complete copy of WPG’s 2018 Form 10-K may be accessed by visiting <https://www.sec.gov/Archives/edgar/data/1594686/000159468619000007/wpg201810-k.htm>.

procedures to market, auction, and sell the Debtors' real estate and other assets as a going concern, separated into: (i) procedures that apply to certain "go-forward" stores and related assets that the Debtors have deemed profitable; and (ii) global procedures that apply to the Debtors' remaining assets that are not sold as part of the "go-forward" stores (collectively, the "Sale").

5. On November 19, 2018, this Court entered its *Order Approving Global Bidding Procedures and Granting Related Relief* (Docket No. 816) (the "Sale Procedures Order") which, among other things, approved the Sale Motion.

6. In connection with the Sale Procedures Order, on January 18, 2019, the Debtors filed the *Notice of Successful Bidder and Sale Hearing* (Docket No. 1730) (the "Notice of Successful Bidder") stating that Transform Holdco, LLC (the "Buyer"), established by ESL Investments, Inc., was the highest and/or best offer for all or substantially all of the Global Assets.

7. On January 25, 2019, WPG timely and properly filed its *Objection and Reservation of Rights of Washington Prime Group Inc. to the Proposed Cure Amounts in Connection with the Debtors' Proposed Assumption and Assignment of Leases and Contracts* (Docket No. 1945) (the "WPG Cure Objection"), objecting to, among other things, the Debtors' proposed cure amount in connection with the potential assumption and assignment of certain WPG Leases.⁵

8. On January 26, 2019, WPG timely and properly filed its *Objection and Reservation of Rights of Washington Prime Group Inc. to: (I) The Global Asset Sale Transaction; and (II) The Proposed Assumption and Assignment of Leases and Contracts in Connection Therewith* (Docket No. 2003) (the "Sale Objection"). In the Sale Objection, WPG objected to the Sale and asserted, among

⁵ WPG timely and properly supplemented the WPG Cure Objection on April 26, 2019 (Docket No. 3393). To the extent this Court holds a hearing on May 8, 2019 regarding the assumption and assignment of the Potentially Assigned Leases, as defined herein, WPG requests that cure objections be heard on a status-only basis at the May 8, 2019 hearing.

other things, that any order approving the Sale must preserve rights of all parties, including WPG, under easements, reciprocal easement agreements, operating or redevelopment agreements, covenants, licenses, or permits.

9. In the Sale Objection, WPG also reserved its rights to, among other things:

...supplement and/or amend this Objection and to assert any additional objections with respect to any possible or proposed assumption and assignment of the WPG Leases on any and all grounds including, but not limited to: (i) any additional objections with respect to any potential assumption and assignment of the WPG Leases and proposed sale procedures;...and/or (iii) all other objections with respect to the relief requested that may subsequently be sought by the Debtors and/or any other party, as such requested relief relates to the WPG Leases and/or the interests of WPG.

Sale Objection, ¶ 34.

10. On February 8, 2019, this Court entered its *Order (I) Approving the Asset Purchase Agreement Among Sellers and Buyer, (II) Authorizing the Sale of Certain of the Debtors' Assets Free and Clear of Liens, Claims, Interests and Encumbrances, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts, and Leases in Connection Therewith (and) (IV) Granting Related Relief* (Docket No. 2507) which, among other things, approved the Sale (the “Sale Order”). In Paragraph 3 of the Sale Order, all assumption and assignment objections to non-Initial Assigned Agreements, including the Sale Objection, were continued and the rights of objecting parties, including WPG, were fully reserved.⁶ Based on information and belief, the Sale closed on February 11, 2019.

11. On April 2, 2019, this Court entered its *Order (I) Authorizing Assumption and Assignment of Certain Executory Contracts and Leases and (II) Granting Related Relief* (Docket No. 3008) (the “Assumption and Assignment Order”). The Assumption and Assignment Order established procedures for, among other things, assuming and assigning leases and contracts to the

Buyer. As provided by the Assumption and Assignment Order:

To the extent that the Debtors or any other party seek to assume and assign any real estate leases to which a Debtor is a party free and clear of any interests, covenants, or rights applicable to such real estate assets that limit or condition the permitted use of the property such as easements, reciprocal easement agreements, operating or redevelopment agreements, covenants, licenses, or permits (collectively, “Restrictive Covenants”), *the applicable Designated Lease Notice shall describe the Restrictive Covenant that the party is seeking to extinguish or otherwise diminish* and any non-Debtor counterparty to a restrictive covenant will have fourteen (14) calendar days from the filing and service of the Designated Lease Notice to file and serve an objection thereto....

Assumption and Assignment Order, ¶ 26 (emphasis added).

12. On April 5, 2019, the Debtors filed the Supplemental Notice of Assumption and Assignment which schedules the WPG Leases associated with Store Nos. 1081, 2265, 1578, 1141, 1288, and 1154 (the “Potentially Assigned Leases”) for assumption and assignment to Transform Operating Stores LLC (the “Potential Assignee”). Paragraph 18 of the Supplemental Notice of Assumption and Assignment provides:

In accordance with paragraph 59 of the Sale Order and paragraph 26 of the Assumption and Assignment Order, Buyer intends to designate the Additional Designatable Leases for assumption and assignment free and clear of any interests, covenants, or rights applicable to such real estate leases to the extent the same limit or condition the permitted use of the property such as easements, reciprocal easement agreements, operating or redevelopment agreements, covenants, licenses, or permits (collectively, “Restrictive Covenants”) that are executory and do not run with the land. Counterparties to the Additional Designatable Leases shall file and serve any objections with respect to the immediately preceding sentence (a “Restrictive Covenant Objection”) in accordance with Amended Case Management Procedures so as to be filed and received no later than the Objection Deadline.

Supplemental Notice of Assumption and Assignment, ¶ 18.

13. The deadline to object to the Supplemental Notice of Assumption and Assignment, including the deadline to file a Restrictive Covenant Objection, is May 3, 2019 at 11:30 a.m. Eastern Time.

⁶ For clarity, none of the WPG Leases were included among the Initial Assigned Agreements, as defined and described

RESERVATION OF RIGHTS

14. Counsel for WPG has been in discussions with counsel for the Buyer regarding certain issues regarding the proposed assumption and assignment of the Potentially Assigned Leases including, but not limited to: (i) the Buyer continuing to comply with certain of the Restrictive Covenants that apply to the Potentially Assigned Leases; (ii) the Buyer continuing to comply with the terms of the Potentially Assigned Leases; and (iii) the Buyer providing adequate assurance of future performance under the Potentially Assigned Leases.

15. Upon information and belief, the parties are in conceptual agreement on a resolution that will resolve the concerns WPG raised in connection with the assumption and assignment of the Potentially Assigned Leases, subject to appropriate documentation by the parties.

16. WPG submits this Reservation of Rights in an abundance of caution. While WPG believes that the parties will be able to finalize documentation sufficient to address the concerns raised by WPG regarding the assumption and assignment of the Potentially Assigned Leases, until the parties finalize such definitive documentation, WPG reserves all rights to object to the Supplemental Notice of Assumption and Assignment and object to the assumption and assignment of the Potentially Assigned Leases.

[Signature page follows.]

Dated: May 3, 2019

FROST BROWN TODD LLC

/s/ Ronald E. Gold

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2019, a copy of the foregoing was served electronically or via First Class Mail, postage prepaid upon all those identified on the Master Service List as of April 15, 2019 in accordance with: (i) this Court's *Amended Order Implementing Certain Notice and Case Management Procedures* entered November 1, 2018 (Docket No. 405); and (ii) the Supplemental Notice of Assumption and Assignment and the service requirements established thereby.

/s/ Ronald E. Gold

Ronald E. Gold

EXHIBIT A

“WPG Leases”

<i>Potentially Assigned WPG Leases</i>		
<i>Shopping Center</i>	<i>Store No.</i>	<i>City, State</i>
Boynton Beach Mall (including Auto Center)	1755, 6820	Boynton Beach, Florida
Indian Mound Mall	1081	Heath, Ohio
Mall at Johnson City	2265	Johnson City, Tennessee
Pearlridge	1578	Aiea, Hawaii
Port Charlotte Town Center	2145	Port Charlotte, Florida
Town Center at Aurora	1141	Aurora, Colorado
Weberstown Mall	1288	Stockton, California
Whitehall Mall	1154	Whitehall, Pennsylvania
<i>Seritage SRC Finance LLC-Associated Leases</i>		
<i>Shopping Center</i>	<i>Store No.</i>	<i>City, State</i>
Dayton Mall	1560	Dayton, Ohio
Great Lakes Mall	<i>Not Scheduled</i>	Mentor, Ohio
Lindale Mall	<i>Not Scheduled</i>	Cedar Rapids, Iowa
Maplewood Mall	<i>Not Scheduled</i>	St. Paul, Minnesota
University Town Plaza	<i>Not Scheduled</i>	Pensacola, Florida
Westminster Mall	<i>Not Scheduled</i>	Westminster, California
<i>Remaining WPG Leases</i>		
<i>Shopping Center</i>	<i>Store No.</i>	<i>City, State</i>
Anderson Mall	<i>Not Scheduled</i>	Anderson, South Carolina
Cottonwood Mall	<i>Not Scheduled</i>	Albuquerque, New Mexico
Northwoods Mall	<i>Not Scheduled</i>	Peoria, Illinois
Orange Park Mall	<i>Not Scheduled</i>	Orange Park, Florida
Rolling Oaks	<i>Not Scheduled</i>	San Antonio, Texas
Seminole Towne Center	<i>Not Scheduled</i>	Sanford, Florida
Sunland Park Mall	<i>Not Scheduled</i>	El Paso, Texas
West Ridge Mall	<i>Not Scheduled</i>	Topeka, Kansas